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No. 09-230

Supreme Court, U.S.
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In The

Supreme Court of the United States

BACILIO A. AMORRORTU,

Petitioner,

v.

REPUBLIC OF PERU,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that the Republic of Peru is a foreign sovereign entitled to a presumption of immunity under the Foreign Sovereign Immunities Act, and that the facts of this case trigger no exception to that immunity.

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BRIEF IN OPPOSITION

Respondent respectfully requests that the petition for a writ of certiorari be denied.

INTRODUCTION

Pro se Petitioner Bacilio A. Amorrortu ("Amorrortu" or "Petitioner") is a minority shareholder of a Peruvian business company, referred to as "Propetsa." More than ten years ago, Propetsa entered into a contract to provide oil field-related services to PetroPeru, a separate instrumentality of the Peruvian government involved in the exploitation of Peru's oil and gas resources. A dispute arose between Propetsa and PetroPeru and the matter was ultimately resolved by the Peruvian courts in favor of PetroPeru, in an action filed by Propetsa. Propetsa also had failed to pay Peruvian taxes, and thus the tax enforcement agency of the Peruvian government took action to enforce payment of the owed taxes against Propetsa's assets. This is a matter entirely Peruvian.

Petitioner later obtained political asylum in the United States based on his individual political activities. Petitioner, however, believed that he could continue to enforce Propetsa's alleged claims from the United States, although the Peruvian courts had already resolved them. Thus, the Petitioner first attempted to sell the claims to Swiss Bank Corporation ("SBC"), but those efforts failed. Then, much later, the Petitioner brought this lawsuit against the

Republic of Peru (the "Republic"), raising myriad claims for which he personally lacks any standing (the alleged claims belong to Propetsa) and for which there is no nexus to the United States. Petitioner sought a rich windfall through the institution of this lawsuit.

The district court properly dismissed the action for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA"). The Republic of Peru has foreign sovereign immunity, and none of the FSIA exceptions apply: the Republic did not waive immunity; the commercial activity exception does not apply because there was no commercial activity between the Republic and the Petitioner, and to the extent that there was commercial activity between Propetsa and PetroPeru (even if the latter's actions could be attributed to the Republic, which they cannot) it occurred in Peru and had no nexus to the United States; and the expropriation exception also does not apply because there was no expropriation of any property in the United States or elsewhere. *See Permanent Mission of India v. City of N.Y.*, 551 U.S. 193, 197, 127 S.Ct. 2352, 2355 (2007) ("Under the FSIA, a foreign state is presumptively immune from suit unless a specific exception applies.").

The Republic also set forth in its moving papers various additional grounds to dismiss the action, including but not limited to lack of standing, abstention based on comity, *res judicata*, and the bar of the statute of limitations, any of which supported the

dismissal of this action, although the district court did not need to address these alternative grounds based on its ruling.

The Court of Appeals for the Fifth Circuit affirmed the dismissal, holding that the Republic of Peru had foreign sovereign immunity under the FSIA and that none of the exceptions to immunity applied.

Petitioner's petition for a writ of certiorari should be denied for several reasons. The decisions of the courts below were entirely correct, and thus there is no need for further review. Also, this case does not meet the standards for Supreme Court review. As discussed below, there is no conflict in the applicable law, there is no need for a change in law, and this case is not the appropriate vehicle to further address the FSIA and its exceptions. Accordingly, further review is not warranted, and the petition should be denied.

STATEMENT OF THE CASE

1. The Underlying Dispute

Petitioner was a citizen of the Republic when the Peruvian company at which he was an executive and in which he was a minority stockholder, Promociones Petroleras Talara, S.A. ("Propetsa"), entered into a contract with another Peruvian company, PetroPeru. R 9; R 137-39, RE 2:23-25; R 283-84, RE

1:9-10 (¶¶ 23-25).[1] PetroPeru, although state-owned, is autonomous in that it controls its own economic, financial, and administrative affairs. R 137-38, RE 2:23-24; R 284-85, RE 1:10-11 (¶ 27); R 298-99, RE 3:34-35. There is no evidence in the record that Propetsa conducted business operations in the United States, or owned any property in the United States. R 8-19; R 284-85, RE 1:10-11 (¶ 27).

In 1995, Propetsa unsuccessfully sued PetroPeru in a Peruvian court of law claiming approximately $38 million in damages in connection with a disagreement over how much was owed on the Propetsa-PetroPeru contract (the "Peruvian Lawsuit"). R 11-12; R 140-43, RE 2:26-28; R 287-89, RE 1:13-15 (¶ 32). That contract was entered into in Peru, governed by Peruvian law, involved two Peruvian corporations, and related to services provided solely within Peru. R 137-44, RE 2:23-30; R 287, RE 1:13 (¶¶ 32-33); R 294, RE 1:20 (¶¶ 54-55); R 298-300, RE 3:34-36. After numerous appeals, the ruling against Propetsa became final and unappealable on July 19, 2001, thus ending the controversy between Propetsa and PetroPeru, with the final judgment being entitled to "*cosa juzgada*" (*i.e.*, *res judicata*) effect under Peruvian law. R 288, RE 1:14 (¶ 35-36); R 294, RE 1:20.

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[1] Citations to the record are made as follows: "R 123" refers to the Record on Appeal in the 5th Circuit, page 123; "RE 1:1" refers to the Republic's Record Excerpts filed in the 5th Circuit concurrently with the Record on Appeal, Tab 1, page 1. Where applicable, parallel pin-point cites are provided to both.

2. The Propetsa-SBC Agreement

During the pendency of the Peruvian Lawsuit, in October of 1995, Petitioner allegedly negotiated with Swiss Banc Corporation ("SBC") for assignment of Propetsa's legal claims in the Peruvian Lawsuit (the purported "Propetsa – SBC Agreement"). R 12-13. According to the allegations in the record, Amorrortu assigned Propetsa's claims to SBC, Propetsa was to receive a loan from SBC, and SBC would attempt on behalf of Propetsa to collect on the claims against PetroPeru and would retain a percentage. *See* R 38, Exs. 18, 20, 26-27. Petitioner alleges that in December 1996, SBC terminated the purported Propetsa-SBC Agreement – allegedly for "political reasons." Pet. 5-6. Regardless of whether the reasons were "political," SBC had nothing to gain from the assignment, given the adverse ruling against Propetsa in the Peruvian Lawsuit.

3. The Instant Lawsuit

In December of 2006, Petitioner sued the Republic in the United States District Court for the Southern District of Texas. The underlying premises of the suit were Petitioner's allegations that: (1) SBC was acting as an agent or alter ego of PetroPeru in negotiating and terminating the Propetsa-SBC Agreement, and (2) that any acts of PetroPeru were attributable to the Republic. Petitioner thus named

the Republic as the defendant in the instant lawsuit, under his conclusion that SBC was an agent of PetroPeru and therefore of the Republic, and thus that SBC's alleged acts are attributable to the Republic.

a. Petitioner's Premises

With regard to the first premise, as sole evidence of his claim that SBC was acting on behalf of PetroPeru and/or the Republic in its negotiations and purported agreement with Propetsa, Petitioner offered a newspaper article published in *El Comercio*, a Peruvian newspaper. Pet. 6. The district court found this hearsay "evidence" unconvincing:

> SBC is not a defendant in this lawsuit, and Amorrortu has sued neither SBC nor the Republic of Peru for breach of contract. Amorrortu has not pled facts tending to show that SBC was merely the alter ego of the Republic of Peru; a reference to a newspaper article making an ambiguous and unsubstantiated claim that such a relationship exists is simply too speculative a basis upon which to deny the Republic of Peru its sovereign immunity.

Bacilio A. Amorrortu v. Republic of Peru, 570 F.Supp. 2d 916, 922, n.4. (Pet. App. 13a, n.6).[2]

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[2] There are apparent formatting discrepancies, including numbering of footnotes, between the copy of the district court's

(Continued on following page)

The district court also addressed the second premise underlying the allegation that the Republic was responsible for any acts of PetroPeru, and additionally pointed out that Amorrortu himself had no standing to file the instant lawsuit in the first place:

> Even if the Court assumes, as it must for purposes of this motion, that PetroPeru is an oil company wholly-owned by the Republic of Peru, its actions in a commercial market are not attributable to the Republic of Peru itself for purposes of sovereign immunity. *First Nat'l City Bank v. Banco Para El Comercio,* 462 U.S. 611, 626-27, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (hereinafter "*Bancec*") (for purposes of the FSIA, "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such"). Amorrortu has not made any factual or other allegation that PetroPeru was the alter ego of the Republic of Peru, nor has he offered allegations showing that a representative of the Republic of Peru directed the actions of PetroPeru. . . . In addition, just as the Republic of Peru is not the alleged debtor, Amorrortu is not the alleged creditor: the debt, if any, is owed to Propetsa, not Amorrortu. By his own admission, Amorrortu is no longer the president, chief executive officer,

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opinion that is attached to the Petition and the reporter copy. Accordingly, they are parallel-cited throughout this brief.

> or chairman of Propetsa, he is a shareholder with a 26% stake who is suing in his individual capacity. (Compl., Doc. No. 1, at 9.) Not only do these attenuated relationships between the parties and the actions complained of violate the formal requirement that the suit arise out of the actions of the "named defendant," . . . but they preclude a finding that there is a sufficient connection between Amorrortu's cause of action and the commercial acts of the Republic of Peru. . . .

570 F.Supp. 2d at 923 (footnotes omitted). (Pet. App. 15a-17a).

The district court also noted that, even if Amorrortu could somehow prove that SBC acted as the Republic's agent in the Propetsa-SBC negotiations and purported agreement, it would be of no consequence because " . . . the acts of an agent in the United States cannot be attributed to a foreign sovereign for purposes of sovereign immunity; 'it is the acts of the foreign government [itself] that determine whether the foreign acts are commercial within the meaning of the FSIA.' " 570 F.Supp. 2d at 922, n.4 (citation omitted). (Pet. App. 13a, n.6).

b. Petitioner's Attempts to Circumvent the FSIA

Relying on his unfounded premises, Petitioner claimed that SBC's alleged termination of the Propetsa-SBC Agreement constituted "civil rights violations and injuries" by the Republic against him

personally. Pet. 6, 8. He contended that the Propetsa-SBC negotiations were a part of the so-called "Brady Plan" for Peru, because they occurred at the same time that lenders were renegotiating Peru's sovereign debt through the Bank Advisory Committee as part of the Brady Plan. Pet. 3-4. Until Amorrortu filed the underlying appeal, however, he did not allege that the discussions with SBC were actually a part of the Brady Plan (rather than merely occurring at the same time). R 12-13 (¶¶ 14-16).

The term "Brady Plan" derives from a March 1989 speech by Nicholas Brady, then Secretary of the United States Treasury, urging commercial lenders to forgive some of the debt that they were owed by less developed countries, restructure what remained, and continue to grant those countries additional loans. *See generally*, Ross P. Buckley, *The Facilitation of the Brady Plan: Emerging Markets Debt Trading From 1989 to 1993*, 21 Fordham Int'l L.J. 1802 (1998); *see also* R 290, RE 1:16 (¶ 41). Typically, the terms of a Brady Plan are negotiated with the debtor country by an *ad hoc* committee of the nation's largest institutional creditors, generally known as the "Bank Advisory Committee." The members of the committee commit to restructuring the debt that they hold on the agreed terms, and those terms, are also offered to other creditors. *Id.*

Petitioner theorized that if the Propetsa-SBC Agreement was made under the Brady Plan, this would provide a nexus between that agreement and the jurisdiction of the United States, triggering an exception to the FSIA. Pet. 3-4, 6, 12. That the

district court gave little credence to this theory (*see* 570 F.Supp. 2d at 919, and 924, n.6) (Pet. App. 4a-5a, and 17a, n.8) is not surprising. As noted above, the Brady Plan involved the renegotiation of sovereign debt of various Latin American countries, including the Republic, by sovereign nations and their commercial creditors. The Brady Plan did not address private debts, let alone disputed legal claims between private party litigants like those involved in the underlying Peruvian Lawsuit between Propetsa and PetroPeru. Amorrortu submitted no evidence to show that SBC was authorized to act as the Republic of Peru's agent with respect to private claims outside the parameters of the Brady Plan. He acknowledged that the Propetsa-SBC Agreement related to Propetsa's disputed legal claims in the Peruvian Lawsuit, and that SBC was never able to collect the alleged Propetsa claims from the Republic. *See* R 38, Exs. 18, 20, 27, 29.[3] The documents Amorrortu submitted in the district court show that SBC was acting as Propetsa's "representative," *id.*, rather than as the agent of the Republic. And the Republic submitted expert declarations explaining that debts to private

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[3] Notably, as the record shows, these documents were never presented by Amorrortu in support of his Opposition to the Republic of Peru's motion to dismiss. Instead, he apparently attempted to rely on a collection of these documents in support of an unsuccessful motion for entry of a default judgment in the district court. *See* District Court Docket entry 10 (reflecting Amorrortu's filing of an exhibit list). In his appellate brief, Amorrortu discussed the documents, but only cited to the exhibit list. *See* R 38.

entities were ineligible for inclusion in the Brady Plan, which focused on refinancing troubled debt owed by sovereign nations to commercial lending institutions. R 290, RE 1:16 (¶ 41).

Petitioner's other attempt at establishing some nexus between the alleged Propetsa-SBC Agreement and U.S. jurisdiction was his claim that the agreement was formed "under the laws of New York." As the district court correctly observed, however, Amorrortu also admitted that he was not a party to that agreement, and he did not state any breach-of-contract claim related to it. 570 F.Supp. 2d at 924, n.6 (Pet. App. 17a, n.8); *see also* R 38, Exs. 18, 20, 27, 29. Accordingly, the New York choice-of-law clause in the Propetsa-SBC Agreement did not provide a U.S. jurisdictional nexus with Amorrortu's claims, as an individual, against the Republic.

Rather, the central claims in this lawsuit are actually that the Republic is liable to Petitioner for political persecution, because the Republic allegedly confiscated and destroyed Propetsa's assets and failed to pay debts owed to Propetsa. *See, e.g.*, Pet. 2, 3, 5-8. But Petitioner has failed to provide any evidence that any of these alleged actions took place in the United States, or that they had any direct effect in the United States, nor has Petitioner shown any other basis for finding the requisite nexus to U.S. jurisdiction. *See* 570 F.Supp. 2d at 924, n.6. (Pet. App. 17a, n.8).

c. The District Court Decision

Based on the foregoing, the Republic moved the district court to dismiss Petitioner's claims for lack of subject matter jurisdiction under the FSIA. In a well-reasoned and thorough opinion, the district court found that the lawsuit must be dismissed because none of the exceptions to the FSIA applied, and thus the court lacked jurisdiction under the Republic's sovereign immunity.

Specifically, the district court found that the waiver exception of Section 1605(a)(1) of the FSIA did not apply because there was no implication Respondent had waived its sovereign immunity in this case, and because it had explicitly objected to the court's jurisdiction throughout the proceedings. 570 F.Supp. 2d at 921. (Pet. App. 9a-10a). The commercial activity exception of Section 1605(a)(2) did not apply because the alleged political persecution of Petitioner was not a commercial activity. *Id.* at 921-23. (Pet. App. 10a-17a). Further, the complaints of confiscation and destruction of the assets of Petitioner's company were not commercial actions in that they were not actions of a nature that a private person would or could engage in for profit; plus (as discussed above) Petitioner had failed to show that the oil company was the alter ego of Respondent. *Id.* at 922-23. (Pet. App. 14a-15a). The expropriation exception under Section 1605(a)(3) did not apply because the rights complained of appeared to be those of Propetsa, and not of Petitioner as a minority shareholder, and thus the underlying complaint failed to establish that any

of Petitioner's rights were "taken." *Id.* at 924. (Pet. App. 17a-19a).

In addition to the lack of any exception to the FSIA, the Republic also argued to the district court that Amorrortu's claims were barred by *forum non conveniens*, international comity grounds, the act of state doctrine, *res judicata*, failure to state a claim (including a statute of limitations bar), and constitutional law. Because none of the FSIA exceptions applied, it was not necessary for the district court to reach any of these additional bars to Amorrortu's claims. But the district court nonetheless did observe that, even if it had jurisdiction, Amorrortu's claims would likely be barred for one or more of these other reasons, such as the statute of limitations and/or failure to state a claim, given Amorrortu's lack of standing as a shareholder to assert claims on behalf of Propetsa. 570 F.Supp. 2d at 919, n.2, and 923-24. (Pet. App. 5a, n.4, and 15a-17a).

d. The Court of Appeals Decision

Following full briefing on the merits, the United States Court of Appeals for the Fifth Circuit affirmed "for the reasons stated by the district court" in an unpublished opinion. Pet. App. 25a.

REASONS FOR DENYING THE PETITION

The lower courts' decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Moreover, this petition would not be an appropriate vehicle for analysis of exceptions to sovereign immunity under the FSIA, or involvement of the Brady Plan with those exceptions. Further review is therefore unwarranted.

This is not a lawsuit for breach of the alleged Propetsa-SBC Agreement, although Petitioner advances it as the centerpiece of his claims. Petitioner was not a party to that purported contract and thus has no standing to make a claim for breach of it; neither was Respondent a party to that contract, and thus the Republic would not be a proper defendant to such a claim; and in any event the statute of limitations has long-since run on any such cause of action. Instead, this lawsuit represents Petitioner's attempt to use United States courts to recoup millions of dollars that he feels he inappropriately lost (indirectly, as a minority shareholder of a party) long ago in the original Peruvian Lawsuit.

The Foreign Sovereign Immunities Act, however, blocks that attempt, as the courts below properly ruled, and this case presents no new issue under the FSIA. The proper means for analyzing each potential exception to the FSIA have already been well-aired and conclusively decided by the federal courts. The petition claims only that the courts below misapplied

that well-settled law to the unique facts of his case. That is not true, as shown, but even if it were, it would not present an issue warranting this Court's review. *See* S. Ct. Rule 10.

In order to make his claims appear new and interesting, Petitioner attempts to raise the issue of whether nexus with U.S. jurisdiction must be found in claims arising from agreements reached under the Brady Plan. But as discussed above, that issue was asserted for the first time on appeal, and in any event Petitioner has wholly failed to show that the alleged Propetsa-SBC Agreement was actually part of the Brady Plan, let alone that he could, with standing, state a claim against the Republic for breach of that agreement.

In the end, Petitioner's tenuous theory of personal persecution presents nothing of importance for the Court's analysis. It is, at base, no more than Petitioner's own grasping-at-straws attempt to collaterally change the result in the long-since settled Propetsa-PetroPeru adjudication.

I. NO CONFLICT IS PRESENTED HERE.

The headings in the petition allude to conflicts between the decisions of the courts below and other federal court decisions, but the body of the petition fails to provide any substantive analysis of these purported conflicts. Rather, the petition focuses on arguing that the courts below erred in their decisions. Just as these "error" arguments fall short, as discussed

herein, so do Petitioner's vague assertions of conflicting decisions.

A. There Is No Conflict With the Holding in *Elliott*.

Petitioner contends that the courts below failed to recognize the "Peruvian Brady Plan." Pet. 22-24. Petitioner apparently interprets the district court's statement that it was "not entirely clear about the meaning of these allegations" (570 F.Supp. 2d at 919) (Pet. App. 4a) to mean that the court did not recognize the Brady Plan, and that this was dispositive as to the court's granting of the motion to dismiss. Pet. 23-24.

That assertion is not accurate. After noting that Petitioner had not shown with any clarity how the Brady Plan might have applied to Petitioner's claims, the district court provided a reasonable synopsis of its best interpretation of the underlying facts as presented by Petitioner: "[the court's] best interpretation is that Amorrortu, on behalf of Propetsa, sold his right to receive the six million dollars from the Republic of Peru to SBC . . . [etc.]." 570 F.Supp. 2d at 919. (Pet. App. 4a).

Regardless, any difficulty that the district court may have had with understanding Petitioner's allegations and arguments concerning the "Peruvian Brady Plan" did not lead to a decision that conflicts with *Elliott Associates, L.P. v. Banco de la Nacion and the Republic of Peru*, 194 F.3d 363 (2d Cir. 1999), or

any other case law, for that matter. The pivotal issue in *Elliott* was whether that appellant's purchase of Peruvian sovereign debt was "with the intent and for the purpose of bringing an action or proceeding thereon," within the scope and meaning of the applicable New York State statutory law (Section 489 of the New York Judiciary Law). *Id.* at 371 (internal quotes omitted). Section 489, with "roots in the Medieval law of champerty and maintenance," barred debt-assignments taken "with the intent to bring suit thereon" and/or "taken for the purpose, or motive, of stirring up litigation and profiting thereby. . . ." *Id.* at 369 (internal quotes omitted). The entire focus of the Second Circuit's analysis in *Elliott* was whether the court below had properly interpreted and applied Section 489. *Id.* at 371-81. The court did, in passing, note the history and some of the specifics of Peru's Brady Plan, as background for the central issue and to explain why the appellant had purchased the purportedly illegal debt assignment in the first place. But the core facts and issues in *Elliott* are entirely distinct from those in the instant case, which involves no Section 489 issue whatsoever.

Specifically, *Elliott* involved lenders that held distressed commercial debt guaranteed by the Republic of Peru. Here, in contrast, Amorrortu was not a creditor; the Republic of Peru was not a debtor; Propetsa held only disputed legal claims; no U.S. creditor was involved; and no agreement was entered into with the Republic of Peru. Moreover, as discussed above, the instant case had even less to do

with the Brady Plan than did *Elliott*. Thus, *Elliott* is simply not relevant to evaluating the lower courts' decisions here, let alone in any conflict with them.

B. There Is No Conflict With the Holding in *Pravin*.

Petitioner also cites *dicta* from *Pravin Banker Associates, Ltd. v. Banco Popular*, 109 F.3d 850 (2d Cir. 1997), in support of his assertion that Peru's agreements under the Brady Plan universally constituted "commercial activity." Pet. 30. This is not, however, the holding of *Pravin*. Instead, that case addressed the issue of whether, at the time, continuing to extend international comity to Peru's Brady Plan negotiations would violate U.S. policy.

In *Pravin*, the Banco Popular del Peru ("Banco Popular") and the Republic of Peru appealed from a decision granting summary judgment against them and denying their motion for a stay of the lawsuit pending completion of Peru's efforts to renegotiate its commercial debt under the Brady Plan. *Id.* at 852. The Second Circuit denied the appeal, concurring with the court below that "using principles of international comity to defer further the enforceability of Pravin's debt would violate United States policy." *Id.*

The *Pravin* case focused on "comity" and involved no issues of sovereign immunity. Thus, that decision never analyzed whether the subject debt was "commercial" with respect to the FSIA definition. The facts and issues in *Pravin* are entirely distinct from those

in the instant case, and there is no conflict between that case and the instant one where the central issue is the Republic's sovereign immunity.

C. There Is No Conflict With the Holding in *Weltover*.

Petitioner also asserts a conflict with this Court's holding in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), which he construes as holding that a sovereign's issuance of bonds is universally a "commercial activity" under the FSIA. Pet. 30. But there are no bonds at issue here, and there is no conflict with this Court's decision.

In *Weltover*, the issue before the Court was "whether the Republic of Argentina's default on certain bonds issued as part of a plan to stabilize its currency was an act taken 'in connection with a commercial activity' that had a 'direct effect in the United States' so as to subject Argentina to suit in an American court under the Foreign Sovereign Immunities Act. . . ." 504 U.S. at 609. The Court examined applicability of Section 1605(a)(2) in determining whether Argentina's issuance of bonds, called "Bonods," providing for payment of interest and principal in U.S. dollars with payment to be made in the New York market at the creditor's election, qualified as "commercial activity" such that it triggered the Section 1605(a)(2) exception to the FSIA. *Id.* at 610. The key question was whether the underlying activity was "commercial" under the FSIA. *Id.* at 612.

The Court opined that the "commercial character of the Bonods is confirmed by the fact that they are in almost all respects garden-variety debt instruments . . . ," and thus the activity was commercial in character as opposed to sovereign. *Id.* at 615, and 617. The Court then turned to the issue of whether the activity had a "'direct effect'" in the United States such that the jurisdictional-nexus element was satisfied. *Id.* at 617. The Court found that, because the bonds were "denominated in United States dollars and payable in New York" and the "financial agent" of Argentina was located in New York, Argentina had "purposefully avail[ed] itself of the privilege of conducting activities within the [United States]." *Id.* at 619. Thus, the Court found the "nexus" element of the FSIA exception to be satisfied. Accordingly, the Court held that Argentina's issuance of the Bonods was a "commercial activity" under the FSIA with the appropriate nexus such that the court below had properly asserted jurisdiction under the FSIA. *Id.*

Petitioner attempts to draw a parallel between *Weltover* and the instant case through his allegation that the Propetsa-SBC Agreement was purportedly made "under New York law." But whether this analogy applies is inconsequential, because Petitioner here asserts no claim for breach of the Propetsa-SBC Agreement, nor can he since he was not a party to that agreement. *See* 570 F.Supp. 2d at 924, n.6; (Pet. App. 17a, n.8); *see also* R 38, Exs. 18, 20, 27, 29. Moreover, as discussed above, Petitioner failed to

show he has standing to file the instant lawsuit for claims of injuries that were allegedly committed against Propetsa, or that any act of SBC was attributable to the Republic. *See also*, 570 F.Supp. 2d at 922, n.4, and 923. (Pet. App. 13a n.6, and 15a-16a).

D. There Is No Conflict With the Holding in *Siderman de Blake*.

Petitioner contends that the district court erred in finding that Respondent has not waived its sovereign immunity, under a theory that the Republic has implicitly waived immunity by allegedly agreeing to a New York choice-of-law clause in the Propetsa-SBC Agreement through its purported co-conspirator, SBC. Pet. 34-35. In support of this contention, Petitioner cites *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).

In *Siderman de Blake*, the plaintiffs, husband and wife, alleged numerous causes of action arising out of the torture of the husband and expropriation of the couple's property by Argentine military officials. In the district court, Argentina successfully moved to dismiss based on its sovereign immunity. The Ninth Circuit found, *inter alia*, that Argentina had impliedly waived its sovereign immunity because it had deliberately involved the United States courts in Argentina's persecution of the plaintiffs through frivolous and malicious litigation. *Id.* at 720.

Here, unlike in *Siderman de Blake*, there is no allegation that Peru has instituted any action in any

court (federal or State) in the United States against Petitioner, Propetsa, or any other related person. Also, while *Siderman de Blake* refers in *dicta* to a U.S. jurisdiction choice-of-law clause as one example of an implied waiver, such facts were not at issue in that case. *Id.* at 721. Moreover, as already discussed, the district court here correctly found that the choice-of-law clause is not at issue in the instant case either, because neither Amorrortu nor the Republic was a party to the Propetsa-SBC Agreement; even if Amorrortu could somehow show that SBC was acting as the Republic's agent, "the acts of an agent in the United States cannot be attributed to a foreign sovereign for purposes of sovereign immunity" analysis (570 F.Supp. 2d at 922, n.4 [citing *Can-Am Intn'l v. Republic of Trinidad and Tobago*, 169 Fed.Appx. 396, 405-06 (5th Cir. 2006)]) (Pet. App. 13a, n.6); and, in any event, Amorrortu makes no contract-based claim here relating to the Propetsa-SBC agreement.

E. There Is No Conflict with the Holding in *Zappia*.

Petitioner cites *Zappia Middle East Construction Company Limited v. The Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000), for that decision's discussion of the four elements of the FSIA expropriation exception (FSIA § 1605(a)(3)). Petitioner asserts that the lower courts' holdings here conflict with the *Zappia* analysis, because they did not consider "whether a contract unfulfilled, due to political reasons, by the

Respondent represented by SBC, under Peru's Brady Plan, in which there was Petitioner's amounts involved, represents an expropriation exception to the FSIA." Pet. 36.

To the contrary, the district court directly considered the foregoing allegations in analyzing the underlying facts against the *Zappia* analysis, and found that "[t]he allegations in the Complaint, when assumed to be true and given the benefit of every reasonable inference, do not suffice to show that this case is within the expropriation exception." 570 F.Supp. 2d at 924. (Pet. App. 18a). Specifically, the court explained:

> As noted above, the Court is not convinced that any rights in property are actually in issue: the rights complained of appear to be those of Propetsa, whereas the complainant is shareholder Amorrortu, proceeding individually.

Id. This finding was dispositive as to the first *Zappia* element (i.e., whether rights in property are at issue). As to the second element (whether there was a taking of the property), the court found that:

> Even if the rights are Amorrortu's to assert, the Complaint does not establish that the rights were "taken": the property in question was allegedly confiscated to satisfy a debt of unknown origin – a debt, it bears mention, that by Amorrortu's own admission was upheld as valid by the (allegedly corrupt) Peruvian courts.

Id. (Pet. App. 18a-19a). As to the fourth *Zappia* element – whether one of the two nexus requirements was satisfied:

> The property in question – that which has not been destroyed – is and has always been in Peru, and Amorrortu makes no allegation that the remaining property is owned or operated by an agency or instrumentality of the Republic of Peru that is engaged in a commercial activity in the United States.

Id. (Pet. App. 19a). Of course, having already correctly identified (as discussed above) that the Brady Plan provided no basis for finding a nexus between U.S. jurisdiction and Amorrortu's claims against the Republic, the district court did not re-apply any Brady Plan discussion to this nexus analysis.

Thus, having found that at least three of the four required *Zappia* elements remained unsatisfied, the district court correctly concluded that the "expropriation exception" to the FSIA did not apply. This finding comported entirely with the analysis prescribed in *Zappia*.

F. There Is No Conflict with the Holding in *Guevara*.

Without discussing how it might apply to the instant case, Petitioner cites the holding in *Jose Guevara v. Republic of Peru*, 468 F.3d 1289 (11th Cir. 2006). Pet. 37-38. In that case, the Eleventh Circuit analyzed "whether a foreign state's offer of a reward

in return for information enabling it to locate and capture a fugitive falls within the [FSIA's] . . . commercial activity exception to sovereign immunity." 468 F.3d at 1298-99. The issues in the instant case have nothing to do with a sovereign's offering of an award to capture a fugitive abroad. There is no conflict between *Guevara* and the lower courts' holdings here.

II. IN ADDITION TO THE LACK OF ANY CONFLICT, OTHER CONSIDERATIONS ALSO COUNSEL AGAINST REVIEW.

A. This Case Presents No Important Issue for Review.

Notably missing from the petition is any reference to other cases involving plaintiffs claiming that they have been politically persecuted in the United States by a foreign sovereign conspiring with an agent in the United States to breach a contract. This certainly does not appear to be a hotly contested issue in the appellate courts. Rather, Petitioner's theory represents only his own personal effort to recoup money lost in Peru as a result of a Peruvian adjudication.

B. With Many Alternative Grounds for Affirmance, This Case Would Provide a Poor Vehicle for Exploring Application of the FSIA Exceptions.

FSIA immunity is only one of several grounds on which the district court could have granted dismissal of Petitioner's claims. The district court itself noted several of these, including Amorrortu's lack of standing to assert any contract-related claim stemming from the Propetsa-SBC Agreement, his lack of any claim directly against the Republic under that agreement, and expiration of the state statute of limitations concerning that agreement.[4] *See* 570 F.Supp. 2d at 919, n.2, 922, n.4, and 923-24. (Pet. App. 5a, n.4, 13a, n.6, and 15a-17a).

In its motion to dismiss, and in its appellate brief, the Republic presented these and numerous other dispositive flaws on which the court could have relied in granting the dismissal: First, Amorrortu's claims – based as they are upon alleged conduct in the late 1980s and early 1990s – would plainly be time-barred under the applicable statutes of limitations. Second, Amorrortu lacks standing to assert

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[4] It is important to note that, although it was discussed in *dicta*, the question of whether any contract claim relating to the Propetsa-SBC Agreement would be time-barred was not actually decided by the district court. 570 F.Supp. 2d at 919, n.2, 922, n.4, and 925. (Pet. App. 5a, n.4, 13a, n.6, and 21a). Thus, although Petitioner asserts it as one of his "Questions Presented," it is not an issue appropriately presented for this Court's review.

claims for personal recovery due to claimed injury to Propetsa. Third, Amorrortu's claims focus on alleged injuries arising out of the actions of agencies of the Government of Peru and the judicial system of Peru, barring the claims under the act of state doctrine. Fourth, a *forum non conveniens* analysis demonstrates that Peru, rather than the United States, is the appropriate jurisdiction for Amorrortu's claims. Fifth, principals of international comity strongly favor declining to exercise jurisdiction so as not to interfere in the Republic of Peru's sovereign rights and interests. Sixth, Propetsa's claimed injuries have been litigated to a final and binding judgment in Peru, in litigation initiated there by Propetsa under the direction of Amorrortu. And seventh, the exercise of jurisdiction in the case at bar would run afoul of constitutional principles that prevent broadening of the exceptions to the FSIA's grant of sovereign immunity for foreign nations.

The existence of these many alternative grounds to support the dismissal of Petitioner's suit make this case a poor vehicle for reviewing any FSIA issues, even if there were some sort of debate among the appellate courts over whether Brady Plan agreements can create the requisite jurisdictional nexus to trigger an exception to the FSIA. But there is no such debate, and Petitioner's claims do not even arise out of the purported agreement here at issue.

C. The Courts Below Decided Correctly.

The district court conducted a thorough FSIA analysis. Applying well-settled law to the facts alleged here, it correctly found that none of the exceptions to the Republic's sovereign immunity under the FSIA applied: Amorrortu failed to show that the "commercial activity" exception could apply to his claims, 570 F.Supp. 2d at 921-23. (Pet. App. 10a-17a), the Republic has not waived its sovereign immunity, *id.* at 921 (Pet. App. 9a-10a), and the expropriation exception has no application to Amorrortu's claims, *id.* at 924 (Pet. App. 17a-19a). The court of appeals correctly affirmed based on the district court's careful reasoning. Pet. App. 25a. The petition has done nothing to show that reasoning was demonstrably wrong, let alone wrong in any extraordinary way worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: September 24, 2009

Respectfully submitted,

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